1972

Gale Lee Boone v. John W. Turner, Warden, Utah State Prison : Brief of Respondent

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IN THE

SUPREME COUR

OF THE

STATE OF UTAH

GALE LEE BOONE,

Plaintiff-Appe

vs.

JOHN W. TURNER, Warden, U
State Prison,

Defendant-Re

BRIEF OF RE

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JUDICIAL DISTRICT COU
LAKE COUNTY, STATE O
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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

GALE LEE BOONE,
Plaintiff-Appellant,

vs.

JOHN W. TURNER, Warden, Utah State Prison,
Defendant-Respondent.

Case No. 12705

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Gale Lee Boone, appeals from a decision of the Third Judicial District Court denying his release from the Utah State Prison upon a petition for a writ of habeas corpus.

DISPOSITION IN LOWER COURT

On September 5, 1971, Gale Lee Boone filed a complaint and petition seeking a writ of habeas corpus in the Third Judicial District Court, Salt Lake County, alleging that his commitment to the Utah State Prison was invalid. The matter came on for hearing on October 21, 1971, before the Honorable Ernest F. Baldwin, Jr., who denied the petition on October 28, 1971.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmance of the denial for a writ of habeas corpus rendered in the court below.

STATEMENT OF FACTS

Respondent makes a general stipulation to the facts set forth in appellant's brief with the exception that respondent denies appellant's assertion that he failed to consult his attorney before entering his guilty plea.

ARGUMENT

POINT I.

THE CIRCUMSTANCES SURROUNDING APPELLANT'S GUILTY PLEA DEMAND THE CONCLUSION THAT SAID PLEA WAS INTELLIGENTLY AND VOLUNTARILY ENTERED.

Appellant contends that he had not discussed his constitutional rights with his attorney prior to his plea of guilty; that the court failed to advise him of his constitutional rights before accepting his plea; and that he entered a guilty plea without knowledge of the consequences of said plea. Hence, appellant urges that his plea of guilty was involuntarily and unintelligently given and should be rendered invalid under *Boykin* v. *Alabama*, 395 U. S. 238, 89 S. Ct. 1709, 23 L. Ed. 274 (1969).

The relevant portion of appellant's transcript is set forth below:

THE COURT: You have heard the information read, Mr. Boone. Do you want to enter a plea at this time or await the statutory time within which to plead?

THE DEFENDANT: Plead now.

THE COURT: And waive the statutory time?

THE DEFENDANT: (Nodded affirmatively).

THE COURT: Let the record show that he nodded yes. And what is your plea Mr. Boone?

THE DEFENDANT: Guilty.

THE COURT: Let the record show that the defendant has entered a plea of guilty. Now, Mr. Boone, have you been informed as to the consequences of entering a plea of guilty?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that burglary carries a term in the Utah State Prison?

THE DEFENDANT: Yes, sir.

THE COURT: And knowing that, and knowing that you may go there do you still desire to enter a plea of guilty?

THE DEFENDANT: Yes, sir.

THE COURT: O. K. Let the record so show.

MR. MITCHELL: The defendant has informed me that he wants it done immediately, your Honor.

THE COURT: Have you got a previous record?

THE DEFENDANT: Yes, sir.

THE COURT: A serious record?

THE DEFENDANT: Yes, sir.

MR. MITCHELL: Your Honor, in this connection his only record is as a juvenile.

MR. LEARY: If the Court please, I took a hasty look at the record, and as I recall, it was a robbery charge. I don't recall how that was handled, but it seems to me it was through the district court. He was confined at the Industrial School.

THE COURT: You were here before me before:

THE DEFENDANT: Yes, sir. I was on probation. I was committed to the State Industrial School for three years and put on probation.

MR. LEARY: It was on a robbery charge.

THE COURT: That was my recollection. Is there any point in referring this to the Adult Probation and Parole?

MR. MITCHELL: None, your Honor.

THE COURT: The judgment and sentence of this Court, Mr. Gale Lee Boone, is that you be sentenced to the Utah State Prison for the indeterminate term provided by law and a commitment will issue forthwith (R. 2-4).

Neither the Transcript of appellant's arraignment nor appellant's brief supply facts which might tend to

support any assertion that the 1960 guilty plea was involuntary, i.e., entered as a result of inducement, coercion, or duress. Absent a showing of such facts, appellant's guilty plea must be deemed acceptable unless it can be shown that appellant was not advised of the consequences of such plea, since a plea of guilty must involve a knowing and intelligent waiver of fundamental constitutional rights.

Boykin, supra, involved an appeal from a conviction for armed robbery based upon appellant's plea of guilty in a state court. The Supreme Court of the United States held that an acceptable guilty plea may not be presumed unless it is affirmatively shown by the record to have been entered voluntarily and intelligently and that a record silent on the issue constitutes reversible error. State cases reviewing *Boykin,* however, have been willing to give it prospective application only. See *Miller* v. *Rhay,* 1 Wash. App. 1010, 466 P. 2d 179 (1970); *In re Tahl,* 81 Cal. Rptr. 577, 460 P. 2d 499 (1969); *State* v. *Griswold,* 105 Ariz. 1, 457 P. 2d 331 (1969). Inasmuch as appellant's plea was entered in 1960, 9 years prior to *Boykin, supra,* it will be necessary to adjudge the acceptability of his plea in light of pre-*Boykin* standards.

Intelligent waiver requirements similar to those found in *Boykin, supra,* are also found in cases prior to 1969 *Machibroda* v. *United States,* 368 U. S. 487 (1962), is representative of the then-existing law. That case involved a plea of guilty to bank robbery charges. In holding the plea to represent a valid waiver of important con-

stitutional rights, Justice Stewart, speaking for the majority, declared that courts should be careful not to accept guilty pleas unless they are made voluntarily after proper advice and with full understanding of the consequences. See also *Kercheval* v. *United States*, 274 U. S. 220, 223 (1927). However, neither that court nor any other court up until the decision in *Boykin, supra*, ever demanded that the record affirmatively show the fulfillment of those requirements. The crucial inquiry, then, is to determine what constitutes a valid guilty plea where the record does not affirmatively show that the accused was advised of the consequences of such a plea.

In *State* v. *Banford*, 13 Utah 2d 63, 368 P. 2d 473 (1962), the court below had accepted a guilty plea from a minor who was not represented by counsel without advising him of the consequences of his plea. In rendering the plea invalid, the court unanimously held that where a defendant is not represented by counsel, the court should not accept a plea of guilty until it has explained to the defendant the consequences of such plea, pursuant to Utah Code Ann. § 77-24-6 (1953). However, neither statute nor case can be found in Utah setting forth the procedure to be adopted by the court where the defendant, as in the instant case, is represented by counsel. In the absence of such authority, decisions in close-lying jurisdiction may be helpful.

In re Tahl, supra, involved a guilty plea by the accused to counts of murder, grand theft, and rape. In that case, as in the instant case, the lower court failed

to advise the accused of the consequences of his guilty plea before accepting it. The California Supreme Court cited numerous cases relative to the problem and concluded that a review of California law indicated that the crucial factor in the acceptability of a guilty plea is the presence of counsel:

> "If an accused has counsel, courts have generally assumed, in the absence of evidence to the contrary, [that] counsel will perform his duty *as an advocate and an officer of the court* to inform the accused of and take steps to protect rights afforded him by law.
>
> "The California rule has been stated as follows: 'The court must inform the defendant of his right to counsel, but need not inform him of the consequences of his plea; that is, the responsibility of his counsel, not the court.' (Citation omitted.)" (Emphasis added.) 81 Cal. Rptr. at 582.

Thus, where counsel is present the court will assume the accused has been properly advised of his rights. A guilty plea under such circumstances will be deemed acceptable under due process requirements. In the instant case, it is apparent that appellant was represented by counsel both before and at the time the guilty plea was entered.

In addition, courts have traditionally evaluated defendant's understanding of the consequences of a guilty plea from other circumstances such as age, prior record, length of time between arrest and arraignment, and other factors implying familiarity with the criminal procedure. As the transcript of appellant's arraignment discloses,

petitioner had been before the same judge on a previous occasion. Two weeks had elapsed between the time of arrest and the time of the arraignment, and petitioner had conversed with his attorney in regards to the guilty plea prior to arraignment (R. 35). Further, it appears that the court specifically inquired of appellant whether he understood the consequences of his plea, to which appellant answered in the affirmative. The court also made it very clear to petitioner that a term at the state prison would be a consequence of a plea of guilty. All of these factors support a conclusion that appellant knowingly and understandingly entered his plea of guilty.

It is also of significance that the trial court, Honorable Ernest F. Baldwin, Jr., presiding, denied appellant's petition for a writ of habeas corpus which denial included a finding that appellant's plea of guilty was intelligently entered (R. 17). The court in *Brown* v. *Turner*, 21 Utah 2d 96, 440 P. 2d 968 (1968), facing a situation similar to the instant appeal, ruled as follows:

> "[I]t should also be kept in mind that the questions as to whether he [the accused] was . . . properly advised as to the consequences of his plea of guilty are primarily questions of fact. The trial court having heard evidence relating thereto and having found the issue against plaintiff, it is our . . . duty to indulge the usual credit due his findings and judgment." *Id.* at 99.

Absent a showing of abuse of discretion at the lower court level, it is submitted that this court affirm the denial of the petition for a writ of habeas corpus on the grounds

that appellant's plea of guilty was intelligently and voluntarily entered.

POINT II.

APPELLANT'S PAROLE REVOCATION HEARING WAS CONDUCTED IN CONFORMITY WITH DUE PROCESS REQUIREMENTS AND REPRESENTS A VALID EXERCISE OF THE DISCRETIONARY AUTHORITY CONFERRED UPON THE BOARD OF PARDONS.

Appellant contends that minimal due process requirements demand that a parolee be given the right to have witnesses testify in his behalf at a parole revocation hearing. Appellant's claim is frivolous and without merit.

Appellant bases his argument for a right to witnesses at a parole revocation hearing on the assumption that his "liberty" is at stake. The court in *Beal* v. *Turner*, 22 Utah 2d 418, 454 P. 2d 624 (1969), indicates why the assumption is erroneous. That case involved a parole revocation hearing also, during which the defendant pled to numerous parole violation charges without an attorney. The ultimate holding that the parolee was not entitled to counsel at a parole revocation hearing was the product of the court's analysis of the status of a parolee.

> "When the defendant has been tried and convicted and sentenced, and no appeal or other proceedings are pending to test the propriety of the guilty verdict, then the critical stages of the pro-

> ceedings are over, and the defendant has no constitutional rights to be placed on . . . parole. *His being placed on . . . parole is merely a matter of grace* given because of confidence reposed in his promises to refrain from criminal acts and to be a useful law-abiding citizen. When a . . . parolee violates the confidence reposed in him, he ought not to be heard to cry when he is simply given the just desserts to which he was originally entitled." (Emphasis added.) *Id.* at 421.

A parolee is a prisoner outside prison walls, whose "liberty", as spoken of in the Fourteenth Amendment, has already been taken away by judicial fiat. Any "liberty" enjoyed by the prisoner thereafter and during the term of his sentence is less than that contemplated by the Fourteenth Amendment, and can be taken away without the usual Fourteenth Amendment restrictions.

Appellant makes no claim that his conviction on the charge of resisting an officer did *not* violate a provision of his parole agreement. Nor does appellant contend that the Board of Pardons lacked authority to revoke his parole upon such grounds. The substance of appellant's argument is that the recent Supreme Court decision in *Morrissey* v. *Brewer*, ... U. S. ....., 33 L. Ed. 2d 484, 92 S. Ct. ..... (June 29, 1972), is evidence for the proposition that a parolee shall be allowed to present witnesses in his behalf at a parole revocation hearing. Nevertheless, as appellant himself concedes, that decision is to have application only to future revocation proceedings. The law under which appellant's revocation hearing must be evaluated is correctly stated in *Alverez* v. *Turner*, 422 F. 2d

214 (10th Cir. 1970). The court in that case set forth the requirements that due process demanded of a parole revocation hearing:

> "[W]e affirm our holding in *Gonzales* v. *Patterson*, 370 F. 2d 94, that the due process clause of the fourteenth amendment does not generate rights to confrontation nor to cross-examination or compulsory process (citation omitted). We also hold that due process does not comprehend the dual rights to *witnesses under oath and evidence in conditional release hearings.*" (Emphasis added.) 370 F. 2d 214.

The Board of Pardons, pursuant to the discretionary authority conferred upon it under Utah Code Ann. §§ 77-62-16 and 77-62-17 (1953) determined that appellant's violation of a state penal law (resisting a police officer, Utah Code Ann. § 76-58-54 (1953)) was sufficient to require a parole revocation. Appellant cannot be heard to attack that decision.

CONCLUSION

For the reasons above stated, that appellant's plea of guilty was given intelligently and voluntarily, and that the parole revocation hearing was constitutionally expedited, respondent respectfully submits that the judgment and order of the court below be affirmed.

Respectfully submitted,

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